IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.78 OF 2001
IN
SUIT NO.214 OF 1978

1. Smt. Chandan Mulji Nishar,
wife of deceased Mulji Khetshi Nishar,
aged 62 years, Currently residing
at 11 and 12, Dagras Mansion, 16th
Road, Chembur, Mumbai-400 071

2. Smt. Meera Mahendra Satra
Daughter, Age 39 years, Currently
residing at 104, Jal Tarang, Lake
View Estate, 2-A, A.S.Marg, Powai
Mumbai 400 076.

3. Ms.Deepna Mulji Nishar, Daughter
Age 38 years, Currently residing at
540, Mansion Park Drive, 103,
Santa Clara CA-95064, U.S.A.

4. Mrs. Jasmine Manish Gandhi
Daughter, Age 35 years, Currently
residing at Wakefield Plantation,
2908, Mountain Ash Court, Raleigh,
NC-27614, U.S.A.

5. Mrs. Heena Bharat Chheda, Daughter
Age 32 years, 45A/2, Sharda Prasad,
Jawahar Nagar Road No.6,
Goregaon (West),
Mumbai 400 062 ...Appellants
(Orig.Plaintiffs)

V/s.

1. Union of India

2. A Macrae & Co. Private Ltd.,
A Private Limited Company by Shares
Incorporated under the Indian
Companies Act, 1913, and having its
registered office at United India
Building, 2nd floor, Sir Phirozshah
Mehta Road, Fort, Mumbai 400 001.

3. Shyam Investment Corporation Pvt.
Ltd., A Private Limited Company by
shares incorporated under the

Companies Act I of 1956, and having its registered office at 42/1, Strand Road, Calcutta-7, and Branch offices at Shree Nivas House, Waudby Road, (Hazarimal Somani Road), Fort, Mumbai- 400 001, and United India Building, 2nd floor, Sir Phirozshah Mehta Road, Fort, Mumbai- 400 001.

4. Agents (India) Private Limited, A Private Company Limited by shares incorporated under the Companies Act I of 1956, and having its registered office at 42/1, Strand Road, Calcutta- 7, and branch offices at United India Building, 2nd floor, Sir Phirozshah Mehta Road, Fort, Mumbai 400 001.

5. Sevenatilal Jivanlal Parekh of Mumbai Indian Inhabitant, residing at 72, Marine Drive, Mumbai 400 001

6. Ashok Umedbhai K. Patel of Mumbai Indian Inhabitant, residing at 91, White House, Walkeshwar Road, Mumbai 400 006, A Trustee of Shankarbhai Dajibhai Patel Public Charitable Trust having its office at Rahimtoola House, 7, Homji Street, Fort, Mumbai 400 001.

7. Sudhir Chhotabhai Patel of Mumbai Indian Inhabitant, residing at Skyscrapper-A, 6th floor, Bhulabhai Desai Road, Mumbai 400 026.

8. Minaben Vikrambhai Patel of Mumbai Indian Inhabitant, residing at ’Navjivan’, Napean Sea Road, Mumbai.

9. Kishore N. Patel of Mumbai Indian Inhabitant, residing at 5-11, Sika Nagar, Manubhai Desai Road, Mumbai-400 004.

10. Dilip A Patel of Mumbai Indian Inhabitant, residing at Shehnaz, 2nd floor, 10th floor, JVPD Scheme, Mumbai 400 049.

11. Arunbhai Chhotabhai Patel of
Ahmedabad, residing at 73,
Chitrakoot Flats, Ashram Road,
Ahmedabad 380 006.

12. The Charity Commissioner,
Maharashtra State, Having his
Office at 83, Annie Besant Road,
Worli, Mumbai ..Respondents.
(Orig.Defendants)

Mr.Navin Parekh i/b M.N.Kenia, advs. for the Appellants.
Ms.S.I.Shah, adv. for the Respondent No.1.
Ms.Vanita Kakar i/b B.K.Girdharilal, adv. for the Respondent No.2.
Mr.Girish Desai i/b M.M.Shetty, advs. for the Respondent Nos.3 to 5.

CORAM: D.K.DESHMUKH &
J.H. BHATIA, JJ.
DATED: 5th September, 2007.

JUDGMENT: (Per J.H.Bhatia, J.)

1. Legal representatives of original plaintiff have preferred this appeal against dismissal of the suit no.214 of 1978 by the learned Single Judge. Defendant Nos.1 to 12 are the respondent nos.1 to 12 respectively in this appeal. For the sake of convenience, the parties shall be referred to as plaintiffs or defendants.

2. To state in brief, the defendant no.2 is a private Ltd. company and because of non payment of income-tax to the tune of Rs.12,54,144/- from the year 1963-64 onwards, for the recovery of the tax, the tax

recovery officer issued a proclamation on 1st June, 1974, which was published in Government Gazette on 20th June, 1974 for sale of the property of the defendant no.2. The property included the business alongwith the tenancy rights of the defendants over the disputed premises situated at 2nd floor of the United India Building, Sir Phirozshah Mehta Road, Fort, Bombay. The original plaintiff had participated in the auction and his bid for Rs. 1,05,000/-, being the highest, was accepted. At the time of auction, he paid 25% of the auction money and later on, he deposited 75% of the amount. Nobody had taken any objection nor had applied for setting aside the same within 30 days from the date of auction. The defendant no.1, through income-tax officer, issued sale certificate in favour of the original plaintiff on 27th August, 1974. The suit premise is actual property of Life Insurance Corporation of India and the defendant no.2 was a tenant over the same. As per the auction, the tenancy rights of the defendant no.2 over the said premises alongwith his business were put to sale and they were purchased by the plaintiff. The Plaintiff requested the income-tax authorities to put him in possession of the suit premises alongwith its business including movable articles. However, the income-tax authorities failed to put him in possession. Therefore, the plaintiff filed

the suit for possession of the business with moveable articles, goodwill and the tenancy rights of the defendant no.2 over the suit premises.

3. The defendant no.1 being the Union of India did not file any written statement but made a submission in writing and also participated in the trial of the suit. Defendant Nos.2 and 3 contested the suit. According to them, the defendant no.2 being a tenant was entitled to sub-let the premises and accordingly, in the year 1967 or so, the defendant no.2 had put a charitable trust in possession of the same as tenant. The defendant no.3 was in turn put in possession of the same. The Estate Officer of the Life Insurance Corporation had also commenced eviction proceedings against the defendant nos.2 and 3 but after enquiry it was held that the defendant no.3 was in lawful possession. It is further contended that under the relevant Rent Act, the defendant no.3 is in lawful possession of the premises since prior to 1973 and is protected under the Rent Act. Therefore, he can not be dispossessed from the same without following the procedure of law. It was further contended that as per the Rent Act, the tenancy rights could not have been put to sale and, therefore, the alleged auction and sale of the tenancy rights of the

defendant no.2 is illegal and void.

4. The learned trial Court framed several issues and after hearing the evidence led by the parties, held that the plaintiff had failed to prove that the defendant nos.3,4,5 and 7 are illegal sub-tenants or transferees of the suit premises. The learned Single Judge also held that the sale certificate in favour of the plaintiff is illegal, null, void and unenforceable in law and that he is not entitled to be put in possession of the property sold to him under the sale certificate. In the result, the suit came to be dismissed.

5. Heard the learned counsel for the Parties. After some arguments before this Court in appeal, the learned counsel for the plaintiff contended that if the sale is illegal, void and sale certificate is unenforceable, the Union of India is liable to pay compensation to him or atleast to refund the consideration amount, which it had received from the plaintiff as a consideration of sale in the said auction. He did not press for damages but claimed refund with interest. He contended that the income-tax authorities generally charge 24% penal interest on the arrears of the income-tax from the defaulters and if the

excess payment of income-tax is made by the assessee, it is refunded with interest at the rate of 18% per annum. This contention is not seriously disputed by the learned counsel appearing for the income-tax authorities.

6. During the arguments before the Court, it is conceded that the defendant no.2 was not in actual possession of the suit premises even though he is the tenant of the L.I.C. and he had sub-letted the premises to other defendants and the other defendants, including the defendant no.3 were in possession of the suit premises even before 1973 and, therefore, even the subtenants are protected under the Rent Act applicable to Mumbai. The proclamation issued by the income-tax authorities clearly shows that the business, goodwill and the tenancy rights of the defendant no.2 were being put to auction and it was but natural for the plaintiff, who participated in the auction to believe that on successful bid, he would be entitled to get possession of the tenanted premises alongwith the business and the goodwill of the defendant no.2 . However, after going through the evidence, the learned Single Judge gave a clear finding that the defendant nos.3,4,5 and 7 being lawfully in possession can not be dispossessed by virtue of the said certificate and also held that the sale certificate is illegal, null and void and unenforceable

in law. In view of this finding, in spite of having made the payment of consideration amount, the plaintiff is not in a position to get possession of the suit premises alongwith the business, etc.

7. Section 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law. Section 24 provides if the consideration is for an object, which is unlawful, the agreement is void. The learned Single Judge held that the transfer of tenancy is not permitted under the law and, therefore, the object of the auction being the sale of tenancy rights was unlawful and, therefore, auction as well as the sale certificate are void and unenforceable. This finding is not challenged by any of the parties during the arguments in the appeal. Section 65 of the Indian Contract Act provides that when an agreement is discovered to be void, or when a contract becomes void, any person, who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it. In view of this clear legal position, income tax authorities, who had received the consideration amount from the plaintiff for the contract

of sale, which turned out to be void, is liable to restore and refund the said amount to the plaintiff. The plaintiff had made the alternative prayer for damages. However, no proper evidence has been led to prove the damages but he is entitled to refund of the consideration amount. The fact remains that the plaintiff has been deprived of use of the amount of Rs. 1,05,000/- since 1974. He filed the suit in the year 1978. In our considered opinion, the defendant no.1 Union of India is liable to refund that amount to the plaintiff with interest at the rate of 18% per annum from the date of suit till the realisation of the amount to the plaintiff. The learned Single Judge does not appear to have considered this aspect of the matter. In our view, the appeal deserves to be allowed to that extent.

ORDER

. Appeal partly allowed. The defendant no.1 shall pay the amount of Rs. 1,05,000/- to the Plaintiff with interest at the rate of 18% p.a. from the date of suit till realisation of the amount.

(D.K.Deshmukh, J.)

(J.H.Bhatia, J.)